

MV 98-3

Tax Type: MOTOR VEHICLE USE TAX

Issue: Rolling Stock (Vehicle Used Interstate For Hire)

**STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
CHICAGO, ILLINOIS**

---

|                           |   |                          |
|---------------------------|---|--------------------------|
| THE DEPARTMENT OF REVENUE | ) |                          |
| OF THE STATE OF ILLINOIS  | ) | Case No.                 |
|                           | ) | IBT No.                  |
| v.                        | ) |                          |
|                           | ) | Administrative Law Judge |
| ABC CO., INC.,            | ) | Mary Gilhooly Japlon     |
| Taxpayer                  | ) |                          |

---

**RECOMMENDATION FOR DISPOSITION**

**Appearances:** Special Assistant Attorney General James Dickett, on behalf of the Department of Revenue of the State of Illinois; Collins & Collins, by Michael R. Collins, on behalf of ABC CO., INC.

**SYNOPSIS:**

This matter comes on for hearing pursuant to the timely protest by ABC CO., INC. (hereinafter "ABC" or "taxpayer") of the assessments of tax, interest and penalty issued by the Illinois Department of Revenue (hereinafter "Department") on the taxpayer's purchase of two buses. The taxpayer protested the assessments and requested a hearing thereon.

At hearing, Mr. JOHN DOE testified on behalf of the taxpayer. Specifically at issue is whether the taxpayer is entitled to the "rolling stock" exemption of the Use Tax Act on its purchases of two buses. The parties filed a Stipulation of Facts and Issues

(Taxpayer's Ex. No. 1). Subsequent to the hearing, the parties filed memoranda of law in support of their respective positions.

Following the submission of all evidence and a review of the record and briefs filed herein, it is recommended that this matter be resolved in favor of the Department of Revenue.

**FINDINGS OF FACT:**

1. The Department's prima facie case, inclusive of all jurisdictional elements, was established by the admission into evidence of a certified copy of the Correction of Returns, showing a liability due and owing in the amount of \$2,257 for state Use Tax deficiencies, and penalty in the amount of \$226, for a total of \$2,483 for the period of May 1993. This exhibit pertains to the purchase of one of the buses at issue. (Dept. Ex. No. 1; Tr. p. 8).
2. The Department's prima facie case was further established by the admission into evidence of a certified copy of the Corrections of Returns, showing a liability due and owing of \$2,257 for state Use Tax deficiencies, and \$226 for penalty, for a total of \$2,483 for the period of July 1993. This exhibit relates to the purchase of the second bus at issue. (Dept. Ex. No. 1; Tr. p. 8).
3. Use Tax was assessed on two buses purchased by the taxpayer: bus no. 40 purchased on May 18, 1993, and bus no. 41 purchased on July 29, 1993. (Taxpayer's Ex. No. 1, par. 4).
4. The tax liability period, therefore, is May 1993 and July 1993.
5. ABC CO., INC. is an Illinois corporation located in FICTITIOUS CITY, Illinois. (Taxpayer's Ex. No. 1, par. 1; Tr. p. 15).

6. On April 21, 1988 the Interstate Commerce Commission granted ABC CO., INC. a certificate of authority to operate as a common carrier in interstate or foreign commerce, transporting passengers in charter and special operations between points in the United States. (Taxpayer's Ex. No. 1, par. 2; Stip. Ex. No. 1; Tr. p. 17).
7. As part of its contract with a school district for which the taxpayer provides school transportation services, ABC must provide charter work, if requested. (Tr. pp. 28, 47).
8. The taxpayer also provides charter services for private customers. (Tr. pp. 28-29).
9. The bus trip represented by trip invoice no. 21082 relating to bus no. 41 was never taken; the invoice was cancelled. (Tr. pp. 53-54; Stip. Group Ex. No. 3).
10. During the period of May 1993 through 1996, the taxpayer owned approximately 48 to 50 buses. (Tr. p. 54).
11. During the period of May 1993, the taxpayer had contracts with four school districts or customers to provide regular school route transportation services on a daily basis. (Tr. pp. 55-56).
12. One of the districts with which the taxpayer had a contract during the taxable period was composed of three high schools; another district was composed of nine elementary schools. (Tr. p. 56).
13. During the years 1994 and 1995, the contracts that the taxpayer had for regular school route transportation services remained the same as they existed in 1993. (Tr. p. 56).
14. During the periods of 1993 through 1996, the taxpayer had approximately 50 non-contract customers for whom it provided charter services. (Tr. p. 57).

15. All of the taxpayer's regular school transportation services occurred within the state of Illinois. (Tr. pp. 58-59).
16. In 1993, the taxpayer used 35 buses for regular school route transportation services per school day. (Tr. p. 60).
17. In 1994, 36 buses were used per school day for school routes; in 1995, 39 buses were utilized for school routes and in 1996, 38 buses were used for regular school route transportation services. (Tr. p. 60).
18. In 1993, each bus made an average of approximately five school runs per day. (Tr. pp. 60-61).
19. In 1993 through 1996, based upon the number of trips taken by the buses, the majority of the taxpayer's business consisted of providing school route transportation services. (Tr. pp. 61-62).
20. Also, during the period of 1993 through 1996, based upon income received by the taxpayer, school route transportation services constituted the majority of the taxpayer's business. (Tr. p. 62).
21. In 1993, regular school route transportation services accounted for approximately 85 percent of the taxpayer's gross income. (Tr. pp. 62, 74).
22. For each subsequent year, the amount of gross income attributable to school route transportation services increased. (Tr. pp. 62, 74).
23. In 1993, bus no. 40 made approximately 6 school runs per day, amounting to approximately 1,000 runs per school year, plus 80 to 90 charter trips. (Tr. pp. 63-66).
24. For the years 1994 through 1996, bus no. 40 likewise made approximately 1,000 school runs each year. (Tr. p. 66).

25. There are no trip invoices documenting any interstate movement by bus no. 40 until nine months after its May 1993 purchase. (Tr. p. 66-67).
26. There are no trip invoices in evidence substantiating any interstate movement in 1995 by bus no. 40. (Tr. p. 67).
27. Regarding bus no. 41, during the period of 1993 through 1996, it made four school runs per day on each school day, amounting to 800 to 900 school runs per year. (Tr. pp. 67-68).
28. There are no trip tickets substantiating any interstate movement for bus no. 41 until 15 months after its purchase in July 1993. (Tr. pp. 68-69).
29. During the period of 1993 through 1996, in all probability, most of the taxpayer's charter trips occurred intrastate, as opposed to interstate. (Tr. p.73).
30. The vast majority of charter trips taken by the taxpayer both begin and end in Illinois. (Tr. p. 75).
31. The buses at issue perform both school runs and charter work; it can occur within the same day. (Tr. p. 77).

#### **CONCLUSIONS OF LAW:**

The Department prepared corrected returns for Use Tax liability pursuant to section 4 of the Retailers' Occupation Tax (hereinafter ROT) Act (35 **ILCS** 120/4). Said section is incorporated by reference in the Use Tax Act via section 12 thereof (35 **ILCS** 105/12). Section 4 of the ROT Act provides in pertinent part as follows:

As soon as practicable after any return is filed, the Department shall examine such return and shall, if necessary, correct such return according to its best judgment and information. ... In the event that the return is corrected for any reason other than a mathematical error, any return so corrected by the Department shall be prima facie correct and

shall be prima facie evidence of the correctness of the amount of tax due, as shown therein.

\*\*\*

Proof of such correction by the Department may be made at any hearing before the Department or in any legal proceeding by a reproduced copy ... in the name of the Department under the certificate of the Director or Revenue. ... Such certified reproduced copy ... shall without further proof, be admitted into evidence before the Department or in any legal proceeding and shall be prima facie proof of the correctness of the amount of tax due, as shown therein.

In the case at bar, the taxpayer is challenging the assessment by the Department of Use Tax, penalty and interest on the purchase of two buses. The taxpayer asserts that the purchases are exempt from Use Tax based upon the “rolling stock exemption” as set forth in sections 3-55 and 3-60 of the Use Tax Act as follows:

Sec. 3-55. Multistate exemption. To prevent actual or likely multistate taxation, the tax imposed by this Act does not apply to the use of tangible personal property in this state under the following circumstances:

\*\*\*

- (b) The use, in this State, of tangible personal property by an interstate carrier for hire as rolling stock moving in interstate commerce... . (35 **ILCS** 105/3-55).

Sec. 3-60. Rolling stock exemption. The rolling stock exemption applies to rolling stock used by an interstate carrier for hire, even just between points in Illinois, if the rolling stock transports for hire, persons whose journeys or property whose shipments originate or terminate outside Illinois. (35 **ILCS** 105/3-60).

To be considered an interstate carrier for hire, the taxpayer must either possess an Interstate Commerce Commission Certificate of Authority, an Illinois Commerce Commission Certificate of Authority, or be a carrier recognized by the Illinois Commerce Commission. (See, 86 Ill. Admin. Code ch. I, Sec. 130.340). In the instant case, the parties stipulated that the taxpayer received a Certificate of Authority issued by the Interstate Commerce Commission on April 2, 1985 to operate as a common carrier in interstate commerce transporting passengers in charter and special operations.

Regarding the requirement that the “interstate carriers” must be “for-hire”, the administrative rules provide that “[t]he term ‘rolling stock’ includes the transportation vehicles of any kind of interstate transportation company for hire (... bus line, ...)”. The exemption does not contemplate vehicles:

used by a person to transport its officers, employees, customers or others not for hire (even if they cross State lines) or to transport property which such person owns or is selling and delivering to customers (even if such transportation crosses State lines). 86 Ill. Admin. Code ch. I, Sec. 130.340(b).

In sum, the taxpayer must prove by documentary evidence that is an interstate carrier for hire using rolling stock that transports persons or property moving in interstate commerce. The taxpayer has met the threshold requirement that it is an interstate carrier through the submission of the certificate of authority; it has proven that it was “for hire” through the submission of trip invoices documenting trips across state lines taken by the buses at issue. The taxpayer must now prove that the vehicles at issue are used as rolling stock moving in interstate commerce. That is, the taxpayer must show with competent evidence that its rolling stock (i.e., vehicles ) transports for hire, “persons whose journeys or property whose shipments originate or terminate outside Illinois” and therefore, qualifies for the rolling stock exemption.<sup>1</sup>

Several questions arise, such as (1) what types of trips constitute interstate commerce and qualify for the rolling stock exemption; and (2) how much interstate movement is necessary for an otherwise qualifying taxpayer to be entitled to the

---

<sup>1</sup> Chapter I, Section 130.340(a) of 86 Ill. Admin. Code provides that “... the Retailers’ Occupation Tax does not apply to sales of tangible personal property to interstate carriers for hire for use as rolling stock moving in interstate commerce...” Subsection (d) provides in essence that in order for the rolling stock to be moving in interstate commerce, it must transport, for hire, “... persons whose journeys or property whose shipments, originate or terminate outside Illinois on other carriers. ...” Therefore, the rolling stock exemption itself is explicative of the phrase “interstate commerce”.

exemption. The regulations pertaining to the statutes at issue do not directly address these questions, but do shed some light on the issues. 86 Ill. Admin. Code ch. I, Sec. 130.340 provides in relevant part as follows:

- (c) The rolling stock exemption cannot be claimed by a purely intrastate carrier for hire as to any tangible personal property which it purchases because it does not meet the statutory tests of being an interstate carrier for hire.
- (d) The exemption applies to vehicles used by an interstate carrier for hire, even just between points in Illinois, in transporting, for hire, persons whose journeys or property whose shipments, originate or terminate outside Illinois on other carriers. The exemption cannot be claimed for an interstate carrier's use of vehicles solely between points in Illinois where the journeys of the passengers or the shipments of property neither originate nor terminate outside Illinois.

The stipulation of record (Taxpayer's Ex. No. 1) provides in paragraph 4 that the purchase date of bus no. 40 is May 18, 1993, and the purchase date of bus no. 41 is July 29, 1993. The certified correction of returns provides that the periods covered by the Notice of Tax Liability are May 1993 and July 1993. This information is of considerable consequence because the trip tickets that correspond to the two buses at issue and that comprise Stipulation Group Ex. Nos. 2 and 3 reflect trips that are all outside of the audit period. Of the five trip invoices in evidence for bus no. 40, three trips occurred in 1994, and two trips took place in 1996. The trip invoices in evidence concerning bus no. 41 reflect that two trips occurred in 1994, six trips transpired in 1995, and four trips occurred in 1996.

In the case of Chicago and Illinois Midland Railway Company v. Department of Revenue, 66 Ill.App.3d 397 (1<sup>st</sup> Dist. 1978), the Court held that it is the audit period that is relevant in the determination of whether the rolling stock exemption is applicable. The rolling stock must have moved in interstate commerce during the taxable period.



Applying the holding to the instant case would result in an analysis of 1993 trip invoices, only. It is obvious, therefore, from the above delineation of trips taken by each of the two buses in issue, that the years for which documentary evidence has been produced are not relevant and cannot be considered as they are de hors the taxable period.<sup>2</sup>

However, in an attempt to analyze all aspects of this case, it will be assumed that all the trip tickets proffered can be reviewed. Even accepting this proposition, there are other profound and fatal problems with the taxpayer's case. There are no trip invoices documenting any interstate movement by bus no. 40 until nine months after its May 1993 purchase, and there are no trip invoices substantiating any interstate movement for bus no. 41 until 15 months after its purchase in July 1993. Furthermore, the inconsiderable evidence submitted by the taxpayer as proof that it is entitled to the rolling stock exemption certainly does not support its position. Rather, it manifests the fact that the nature of ABC's business is the intrastate transportation of children for school districts in Illinois. The taxpayer's witness testified that bus no. 40 made approximately 1,000 school runs per year for the period of 1993 through 1996. During the period of 1993 through 1996, bus no. 41 made 800 to 900 school runs per year. During this period, therefore, based upon the number of trips taken by the buses, the majority of the taxpayer's business consisted of providing school route transportation services. Likewise, based upon income received by the taxpayer, school route transportation services constituted the majority of the taxpayer's business in the period of 1993 through 1996. In 1993, for example, the taxpayer's witness testified (but offered no

---

<sup>2</sup> The holding in Chicago and Illinois Midland Railway Company v. Department of Revenue, *id.*, is pertinent to this matter in that the exemption is claimed by the taxpayer at the time of purchase. It is of serious concern if the taxpayer claims the exemption at the time of purchase, but only uses the bus, by happenstance, for an exempt purpose six months, eight months or one year later.

documentation) that 85 percent of the taxpayer's gross income was derived from regular school route transportation services, and that the percentage of income attributable to school runs increased each year. All of the taxpayer's school route transportation services occurred within the state of Illinois.

The buses at issue do perform both school runs and charter work. As part of its contract with a school district for which the taxpayer provides services in the form of school runs, ABC agrees to provide charter services. ABC also provides charter services for private customers. However, compared to the number of school runs taken by the buses at issue, the number of charter trips is inconsequential. For example, in 1993, bus no. 40 made approximately 1,000 school runs, but only 80 to 90 charter trips. The taxpayer's own witness testified that during the period of 1993 through 1996, in all probability, most of the taxpayer's charter trips occurred intrastate. Therefore, the evidence of record demonstrates that the vast majority of the taxpayer's business is comprised of intrastate school runs, with some charter trips, most of which were intrastate.

The scant documentary evidence consisting of five trip invoices for bus no. 40 and 11 trip invoices for bus no. 41 supports this conclusion. (Twelve trip invoices are in evidence relating to bus no. 41, but one trip was cancelled). All of the trip tickets evidence "same day" trips; that is, trips that leave Illinois and return to Illinois the same day. These trips do not qualify for the exemption as the rolling stock did not transport "persons whose journeys or property whose shipments originated or terminated outside Illinois" in that according to the taxpayer's own witness, as well as the documentary evidence, the vast majority of charter trips taken by the taxpayer both begin and end in

---

Illinois, the effect of which is one continuous journey. The number of trips that could even be considered as qualifying for the exemption, therefore, is so diminutive as to be inconsequential. In fact, of the 12 trip invoices in evidence, the only one that relates to an overnight interstate trip bears a notation indicating that it was cancelled. It bears repeating that not one of the trip invoices in evidence relates to a trip taken in the taxable period at issue.

The intent behind the rolling stock exemption is the avoidance of multistate taxation. The case of Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) allows a state to impose a tax on interstate commerce under certain qualifying conditions. In enacting section 3-55 of the Use Tax Act (35 ILCS 105/3-55), the Illinois legislature was reiterating that in order to prevent actual or likely multistate taxation, certain situations are exempted from the application of tax.

There is no suggestion that any other state was in a position to impose its own Use Tax on the rolling stock, nor is there any likelihood of multistate taxation due to the very limited utilization of the buses in other states. Given the facts of the case, it is highly improbable that another state could constitutionally impose a tax on the buses. Due to the lack of any “substantial nexus” between the activity to be taxed and another state, any attempt by another state to tax might well trigger Commerce Clause concerns. (*See, Complete Auto Transit, Inc. v. Brady, supra*).

The taxpayer cites the case of Burlington Northern, Inc. v. Department of Revenue, 32 Ill.App.3d 166 (1<sup>st</sup> Dist. 1975), in support of its position that the rolling stock exemption is to be liberally construed in order to avoid placing any possible burden on interstate commerce. In Burlington Northern, the court was concerned with whether the

imposition of state Use Tax upon the purchase of various transportation vehicles would unduly burden interstate commerce. The court could not find any legislative history or intent regarding the enactment of the rolling stock exemption, and therefore utilized general principles of statutory construction in rejecting the “original intent and primary purpose” standard employed by the Department in determining whether the rolling stock exemption was applicable to the vehicles at issue. The court found that the application of this standard may make it administratively easier for the Department to decide whether the exemption applies, but it has no basis in statute or regulation, nor was it apparently within the contemplation of the legislature. The court therefore found that Burlington Northern’s physical movement across state lines 13 percent of the time, combined with the interstate movement accorded to said taxpayer as a carrier of interstate traffic, was sufficient to allow various transportation vehicles to qualify for the “rolling stock” exemption.

The Burlington court seems to ignore the preamble to the exemptions set forth in section 3-55 of the Act, which provides that “[t]o prevent actual or likely multistate taxation, the tax imposed by this Act does not apply to the use of tangible personal property in this state under the following circumstances... .” This appears to stem from the court’s determination that the Illinois legislature intended to exempt rolling stock moving in interstate commerce regardless of the potentiality of multiple taxation. Because the intent of the legislature is so clearly provided in the statute, I respectfully disagree with the Burlington Court’s determination that the preamble is meaningless and, therefore, merely superfluous.

The Burlington case is factually distinguishable from the instant case. The court in Burlington determined that the purchases of various types of equipment by the railroad company were excepted from Use Tax pursuant to the rolling stock exemption due to the intertwining of taxpayer's intrastate and interstate business. In finding passenger cars exempt, the court held that when considering Burlington's 13 percent of actual physical movement across state lines, combined with the interstate movement "conferred on" the railroad by reason of its transportation of interstate traffic consisting of mail and express packages, it can be concluded that Burlington's "interstate use and involvement is ... intertwined with its intrastate use... ." (32 Ill.App.3d 166, 176). The same reasoning was applied when finding switching engines to be exempt. That is, the railroad company's interstate use and involvement of the equipment was so intertwined with its intrastate use that to discontinue its intrastate business would in great measure negatively affect its interstate business.

The business of Burlington Northern consists in great measure of the interstate movement of people and goods. On the other hand, judging from the percentage of use allocated to intrastate school runs, the nature of ABC's business is the transportation of children for school districts in Illinois. ABC has committed its resources to doing business within Illinois.

In the case of First National Leasing & Financial Corporation v. Zagel, 80 Ill.App.3d 358 (4<sup>th</sup> Dist. 1980), the court opined that oral testimony concerning the taxpayer's interstate activities was insufficient to prove its claim of entitlement to the rolling stock exemption. The court denied the taxpayer the exemption due to the fact that it lacked documentary evidence to indicate the amount of eligible exempt interstate commerce in

which it engaged. In a concurring opinion, Justice Green opined that the equipment at issue crossed on an “infrequent and irregular basis”. There was no bonafide risk of multistate taxation, and therefore, no commerce clause requisite for the apportionment of Use Tax to use in Illinois.

Certainly, in the case at bar, the body of facts that comprise the record indicates that during the taxable year, neither of the vehicles at issue took any trips across the state line. The evidence shows that bus no. 40 took no trips across the state line until nine months after its purchase by the taxpayer in May 1993. Bus no. did not make an interstate trip until 15 months after its purchase in July 1993. Even though it is my determination that ABC is an interstate carrier for hire, it has not proven that its rolling stock transported persons whose journeys or property whose shipments originated or terminated outside Illinois during the year at issue. When comparing the number of school runs over a three year period with the trip invoices presented for the three years subsequent to the taxable period, the results indicate that each of the buses took interstate trips that comprised far less than one percent of its total trips.

When granting exemptions from tax, the burden is on the taxpayer to prove clearly and conclusively its entitlement thereto. Statutes which exempt property or entities from taxation must be strictly construed in favor of taxation and against exemption. (Wyndemere Retirement Community v. Department of Revenue, 274 Ill.App.3d 455 (2<sup>nd</sup> Dist. 1995)). In the case at bar, ABC CO., INC. has failed to carry its burden of proof. It is therefore, my determination that the taxpayer is not entitled to the rolling stock exemption, and that Use Tax was properly assessed on the bus purchases.

**RECOMMENDATION:**

It is my recommendation that NTL Nos. XXXXX and XXXXX be affirmed in their entirety.

Enter:

---

Administrative Law Judge